

Claimant requests review of the nature and extent of disability and temporary total disability compensation from August 14, 2006, through February 13, 2008. Claimant

argues he is permanently totally disabled based upon Drs. Prostin and Pro's opinions. In the alternative, claimant argues he sustained a 24 percent functional impairment and a 91.5 percent work disability (83% task loss and 100% wage loss). Further, claimant argues he is entitled to temporary total disability compensation from August 14, 2006, through February 13, 2008, based upon an average weekly wage of \$300 per week.

Respondent argues claimant has not sustained any functional impairment attributable to his accidental injury because it was only a temporary aggravation of his preexisting degenerative disk disease.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked for five or six months as a dairy manager for respondent. He earned \$7.50 an hour and worked 40 hours a week. His job duties included ordering the dairy and frozen products. He also unloaded semi-trucks, supervised an employee and stocked the shelves. Claimant described his accident on June 28, 2006, as follows:

I was unloading a crate of milk, pulled it into the walk-in freezer, as I pulled a couple of boxes off the crate I stepped into a drain vent the cover was missing from, stumbled back with the milk on top of me.¹

Claimant testified that he had immediate pain in his lower back and right leg. He reported the injury to respondent's manager. Claimant was not able to continue working so he sought medical treatment at Jane Phillips Medical Center's emergency room in Bartlesville, Oklahoma. X-rays were taken and medicine was prescribed. Claimant also sought treatment with a chiropractor, Dr. Karen Wallace, who examined him on one occasion. After being transferred to Dr. David Min, claimant received epidural steroid injections.

Dr. Min released claimant to light-duty work on August 14, 2006, with restrictions of no lifting above 30 pounds and no bending at the waist. Claimant testified that he returned to work and was given a job unloading frozen goods off a pallet. Claimant stated that the job exceeded his weight limit and that he was required to bend over. Claimant said he complained to Bill Floyd, respondent's owner, and Mr. Floyd told him to clock out and go home.

¹ R.H. Trans. at 14.

Mr. Floyd testified that claimant returned to work and began unloading a pallet. Mr. Floyd had not given claimant any instructions concerning what his job would be and denied he told claimant to unload frozen goods. Mr. Floyd said that claimant was unhappy because he was moved away from the dairy department and also because his shift was changed. Mr. Floyd said claimant told him he quit and left.

Claimant continued to treat with Dr. Min, and on September 27, 2006, Dr. Min again restricted him from working.

Dr. Russell J. Green, board certified in occupational medicine, examined claimant on October 24, 2006, at the request of respondent's attorney. Dr. Green performed a physical examination, reviewed medical records and obtained a history from claimant. The doctor diagnosed claimant as having multilevel degenerative joint disease in the lumbar spine, no evidence of ongoing neurologic pathology of the lower extremities, chronic pulmonary disease and back pain symptoms in excess of physical findings. Dr. Green recommended that claimant have a functional capacity test in order to determine his abilities and deficits.

A functional capacity evaluation was performed at Bartlesville Physical Rehabilitation by physical therapist, Mr. Merlin A. Johnson, on November 15, 2006. Based upon the AMA *Guides*², Dr. Green placed claimant in the DRE Category II for a 5 percent whole person lumbar impairment. The doctor opined that claimant's 5 percent impairment is associated with his degenerative changes and therefore he has a 0 percent impairment due to his work-related injury on June 28, 2006.

Dr. Green opined:

Because Mr. Hainline gave poor effort during the performance of the functional capacity evaluation determining actual capacity is complex. Mr. Hainline asserts that his back pain is of such a severe nature that it prevents him from performing more than findings consistent with a sedentary or sedentary-light job. I do not believe the clinical features of his physical examination would support that assertion. It would be my opinion, offered with a reasonable degree of medical center, that Mr. Hainline could perform duties consistent with a light-medium position. With regard to material handling, he could manage weights between 21 and 35 pounds. He could sit, stand, or walk constantly. This recommendation is in excess of the findings of the functional capacity evaluation but more consistent with the findings at physical examination on October 24, 2006.³

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ Green Depo., Ex. 2

Dr. Green agreed that the physical therapist who performed the functional capacities evaluation concluded the test was valid despite the comments about poor effort. And when Dr. Green was deposed he admitted that he was unaware claimant had undergone a discography. Finally, Dr. Green agreed that when he saw claimant in October 2006, claimant had not returned to his baseline condition.

As a result of ongoing litigation on this claim, the ALJ ordered claimant to see an orthopedic surgeon, Dr. Brian Ellefsen, for an independent medical evaluation. After a complete physical examination, Dr. Ellefsen referred claimant to an orthopedic spine specialist, Dr. Brian Ipsen. Dr. Ipsen examined and evaluated the claimant on February 13, 2008, and determined that claimant was not a surgical candidate. The doctor then referred claimant to a pain management specialist, Dr. Sandra Barnett in Wichita, Kansas.

At the request of claimant's attorney, Dr. Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated the claimant on March 14, 2008. Dr. Prostic took a history from claimant and performed a physical examination. Claimant had mild tenderness diffusely in the lower lumbar segments and some hamstring tightness bilaterally supine more than seat. The doctor opined the claimant's physical examination was consistent with the claimant's complaints of pain as well as the mechanism of his work-related injury. Dr. Prostic diagnosed the claimant with a lumbar disk protrusion due to his accidental injury. The doctor opined that claimant's Minnesota Multiphasic Personality Inventory (MMPI) indicated significant psychological barriers to improvement and he recommended an evaluation by a psychotherapist. Based upon the *AMA Guides*, Dr. Prostic opined claimant has a 15 percent permanent partial functional impairment to the body as a whole. Dr. Prostic opined claimant is capable of only light-duty employment with change of position as necessary for comfort.

Dr. Prostic reviewed the list of claimant's former work tasks prepared by Mr. Michael Dreiling and concluded claimant could no longer perform 15 of the 38 tasks for an 83 percent task loss.

Dr. Prostic testified:

Q. Doctor, is it your opinion that Mr. Hainline is permanently and totally disabled?

A. Yes.

Q. And permanently and totally disabled from performing substantial gainful employment?

A. Unless he improves psychologically, he's permanently and totally disabled from gainful employment.⁴

At the request of claimant's attorney, Dr. John D. Pro, board certified physician, psychiatrist and independent medical examiner, examined and evaluated claimant on May 8, 2008. Dr. Pro reviewed claimant's medical records and took a psychiatric and medical history from claimant. The doctor diagnosed claimant as having an adjustment disorder, pain syndrome, history of alcoholism and also generalized anxiety disorder. Dr. Pro opined that claimant's adjustment disorder with depression and pain syndrome were caused by his work-related injury. Based upon the *AMA Guides*, Dr. Pro rated claimant's psychological impairment at 18 percent less 7 percent which was preexisting due to his alcoholism and anxiety disorder. Therefore claimant has an 11 percent psychological impairment to the body as a whole which is related to his work injury on June 28, 2006.

Dr. Pro reviewed the list of claimant's former work tasks prepared by Mr. Michael Dreiling and concluded that claimant can no longer perform substantial and gainful employment due to his psychological and orthopedic impairments.

Dr. Pro testified:

Q. Tell the Court what adjustment disorder with depression is.

A. An adjustment disorder with depression is a psychological disorder that includes symptoms which are engendered by a stressful life event or events and that includes symptoms of depression such as what I've listed here, loss of interest or pleasure, guilt, self-blame, difficulty concentrating, social withdrawal and other symptoms.

The implication of an adjustment disorder is that the stress that causes these psychological symptoms, the psychological reaction with these symptoms, is greater than what you would expect to see. Basically once the stress has been abated, then the implication is that the symptoms get better or resolve altogether once treatment has proceeded.

Q. The stress in this case, would that be the physical injury and the pain from his work injury at Floyd's Town & Country?

A. With the -- yes, it would with the additional loss of the ability to work and be a breadwinner, that's also an important stress.⁵

⁴ Prostic Depo. at 17.

⁵ Pro Depo. at 13-14.

Claimant completed the ninth grade in school and failed an attempt to obtain a GED. Claimant testified he is not able to sit for longer than 30 minutes or stand for 15 minutes before the pain increases to a point where he needs to lay down. He applied for and is receiving Social Security disability benefits.

Michael Dreiling, a vocational consultant, conducted a telephone interview with claimant on September 4, 2008, at the request of claimant's attorney. He prepared a task list of 18 nonduplicative tasks claimant performed in the 15-year period before his injury. Mr. Dreiling concluded claimant was essentially and realistically unemployable in the open labor market due to his vocational factors and significant problems with functioning.

Steven Benjamin, a vocational rehabilitation consultant, conducted telephone interviews which were completed on February 17, 2009, at the request of respondent's attorney. He prepared a task list of 55 nonduplicative tasks claimant performed in the 15-year period before his injury. He further opined that claimant was capable of earning between \$262 and \$299 or an average of \$274.80.

The claimant argues that as a result of his work-related injury he is permanently and totally disabled.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁶

In *Wardlow*⁷, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

⁶ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁷ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

Drs. Prostic and Pro as well as vocational expert Dreiling testified that claimant was essentially and realistically unemployable. Conversely, Dr. Green concluded claimant did not sustain any permanent impairment as a result of his accidental injury. The difficulty with Dr. Green's position is that he saw claimant within a few months of the accident and even though he concluded claimant's injury was temporary and he had suffered no permanent impairment Dr. Green further agreed that claimant's condition had not returned to baseline when he was examined. Moreover, he was unaware of some of the objective test results. Based upon this evidentiary record, the Board finds Drs. Prostic and Pro's opinions more persuasive. Consequently, the Board finds claimant has met his burden of proof to establish that as a result of his work-related accident he is entitled to compensation for a permanent total disability.

Claimant further requested additional weeks of temporary total disability compensation but he has failed to meet his burden of proof to establish entitlement to additional weeks of temporary total disability compensation.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated July 6, 2009, is modified to reflect claimant has met his burden of proof to establish that he is permanently and totally disabled.

Claimant is entitled to 12 weeks temporary total disability compensation at the rate of \$200.01 per week or \$2,400.12 followed by permanent total disability compensation at the rate of \$200.01 per week not to exceed \$125,000 for a permanent total general body disability.

As of February 26, 2010, there would be due and owing to the claimant 12 weeks of temporary total disability compensation at the rate of \$200.01 per week in the sum of \$2,400.12 plus 179.29 weeks of permanent total disability compensation at the rate of \$200.01 per week in the sum of \$35,859.79 for a total due and owing of \$38,259.91, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$86,740.09 shall be paid at \$200.01 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this 26th day of February 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge